United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2352

United States Court of Appeals

For the Second Circuit

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

—against—

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

APPELLANTS' BRIEF

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Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

PRELIMINARY STATEMENT

This is an appeal from an order and judgment of the United States District Court for the Southern District of New York rendered by District Judge Whitman Knapp, on October 10, 1974, dismissing the plaintiffs' complaint (313a).[1/] The district court's order is not reported.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the claim that the defendants discriminate against women by excluding pregnancy and related conditions from compensatory fringe benefit plans states a cause of action upon which relief can be granted under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C.A. § 2000(e) et seq.?

2. Whether the complaint states a cause of action upon which relief can be granted under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution for discrimination on the basis of sex?

3. Whether the complaint states a cause of action upon which relief can be granted under the Equal Protection Clause of the Fourteenth Amendment to the United States

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1/ References to "a" are to pages in the Joint Appendix.

Constitution for invidious discrimination against pregnant women?

4. Whether the complaint states a cause of action upon which relief can be granted under the Due Process Clause of the Fourteenth Amendment to the United States Constitution for an unlawful deprivation of liberty and property?

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED.

These are set forth in an Addendum to the Brief, ("Addendum") infra, pp. 56-59.

STATEMENT OF THE CASE

Plaintiffs, municipal employees of the City of New York, by a complaint filed on January 17, 1974, allege that the defendants have violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000(e) et seq. ("Title VII"), the Fourteenth Amendment to the United States Constitution, and various provisions of State Law by providing health and welfare fringe benefits which are less favorable to women than to men because the coverage and benefits for pregnancy

and maternity are drastically restricted (2a-45a). Three of defendants' programs are challenged in this action: health and hospitalization insurance (27a-35a), disability benefits (36a-39a) and leaves of absence (39a-42a).

The defendants New York City, its officers and related agencies provide a variety of health and hospitalization insurance plans for municipal employees and their dependents (213a). These plans single out a condition unique to females, pregnancy and childbirth, for substantially reduced insurance benefits (28a). For example, hospitalization insurance generally covers the full cost of the first 21 days of a hospital stay and pays one-half of the hospital charges for up to 180 days. In contrast, for hospitalization relating to pregnancy or maternity, insurance coverage is limited to a maximum of $80.00 [2/] (28a-29a). Benefits for pregnancy and childbirth are similarly restricted throughout the defendants' medical insurance plans (30a-33a). Plaintiffs allege in their first cause of action that the City defendants, as employers, have discriminated against municipal employees on the basis of sex by limiting the health and hospitalization

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2/ Although increased benefits are provided for surgical maternity procedures and miscarriage, the coverage is still more restrictive than that provided for non-maternity hospitalization.

insurance provided for pregnancy and childbirth (27a-33a). The defendant insurance carriers are joined with the City in a second cause of action for aiding and abetting the City in the discriminatory provision of health and hospitalization insurance (34a). The defendant unions are joined in a third cause of action for negotiating with the City on behalf of the City's employees and approving the discriminatory insurance plans (35a).

Plaintiffs also allege that the City, unions representing municipal employees and their related welfare funds have established and administered programs which provide benefits to other temporarily disabled City employees but exclude from coverage female employees who are disabled due to pregnancy or childbirth (36a-39a). The disability plans of the defendants United Federation of Teachers Welfare Fund (36a-37a) and District Council 37 Health and Security Plan (37a-38a) deny benefits to pregnant employees disabled because of a complicated or abnormal pregnancy as well as a normal pregnancy. The disability plan of the defendant Social Services Employees Union Welfare Fund (38a-39a) contained a similar exclusion prior to

its amendment February 1, 1973.

Finally, plaintiffs challenge the policies of the City and its related agencies which require pregnant employees to take mandatory maternity leave regardless of their desire or ability to continue working (39a-42a). Plaintiffs allege that defendants' maternity leave policies are unlawful not only because of their mandatory character but also because they are far more onerous than other types of leave. For example, accrued sick or annual leave cannot be utilized by an employee on maternity leave (39a, 40a-41a). An employee on maternity leave loses her entitlement to other fringe benefits while employees absent pursuant to other types of leave do not (39a, 40a-41a). Maternity leave, unlike other leaves, interrupts the continuity of employment for the purpose of determining seniority, promotion and raises (40a-41a). These leave plans are the subject of plaintiffs' seventh, eighth, ninth, tenth and eleventh causes of action (39a-42a).

Several months after the complaint herein was filed, the United States Supreme Court decided Geduldig v. Aiello, 417 U.S. 484, ("Aiello"), and held that

California's exclusion of normal pregnancy-related disabilities from the State's temporary disability insurance plan for California workers did not violate the Equal Protection Clause of the Fourteenth Amendment. Shortly thereafter, the district court, on its own motion, (232a) held a hearing to determine whether the decision in Aiello required dismissal of plaintiffs' complaint (233a-289a).

At that time only the initial stages of this litigation had been reached; indeed, four of the seventeen defendants (defendants Social Services Employees Union, Social Services Employees Union Welfare Fund, District Council 37 and District Council 37 Health & Security Plan) have not even served answers. There had been no discovery and plaintiffs had obtained no more information regarding the negotiation, adoption, operation or cost of defendants fringe benefit plans and policies than that which led them to file their complaint. The defendants had not been required to articulate any rationale justifying their exclusion of pregnancy and related conditions from coverage under fringe benefit plans.

Nevertheless, the district court, without any factual record before it, determined that Aiello required the dismissal of all plaintiffs' claims in the absence of an allegation that defendants' plans and policies were adopted as a "pretext" designed to effect sex discrimination (242a, 254a). Plaintiffs were given leave to amend their complaint to make such an allegation (301a). After plaintiffs elected not to replead, the complaint was dismissed in its entirety (313a-314a). This appeal followed.

ARGUMENT

The district court read the Aiello opinion and particularly footnote 20[3/] to hold that all classifications

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3/ Footnote 20 reads:

> "The dissenting opinion to the contrary, this case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71, and Frontiero v. Richardson, 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition-pregnancy-from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification

[Fn. 3/ cont'd next page]

on the basis of pregnancy are a priori lawful (234a, 239a, 240a, 241a, 247a, 295a-296a). Thus in spite of the substantial differences between the claims raised here and the one raised in Aiello, the court considered all plaintiffs' causes of action to be "variations on a theme" (294a) rejected in Aiello, and dismissed plaintiffs' complaint in its entirety. In so doing, the court ignored crucial legal and factual distinctions between Aiello and the present action:

[Fn. 3/ cont'd from p.8]

concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

"The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups - pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." 417 U.S. at 496-97.

(1) In Aiello the attack on the statute was based solely on a claimed denial of equal protection. The claim made herein for relief based on Title VII was not involved in Aiello.

(2) The attack in Aiello was made on a legislatively enacted social welfare plan. In this action, plaintiffs challenge an employers compensatory fringe benefit program. While the employer here is a governmental unit, it is acting solely in its capacity as employer and not parens patriae.

(3) The only plan under attack in Aiello was a state temporary disability benefits program which excluded from coverage disabilities resulting from normal pregnancy. In contrast, all defendants' health and welfare fringe benefit programs, whether leave of absence, health and hospital insurance or union disability plans, single out pregnancy and provide pregnant women with substantially reduced benefits for normal as well as complicated pregnancy and related conditions.

(4) In Aiello, the Supreme Court found that California had substantial, legislatively determined

interests in limiting the coverage and benefits of its program to maintain the rate of California employees' contributions and the self-supporting nature of the plan. Accordingly, it held that the exclusion of disabilities related to normal pregnancy was reasonable and acceptable. Here no justifying rationale whatever has been put forward for the exclusionary pregnancy-based classification. Indeed, close analysis reveals that no substantial or rational basis exists for the unequal treatment it mandates.

I

PLAINTIFFS' TITLE VII CAUSE OF ACTION FOR DEFENDANTS' DENIAL OF HEALTH AND WELFARE FRINGE BENEFITS TO PREGNANT WOMEN STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. Geduldig v. Aiello, 417 U.S. 484, Has No Application to Plaintiffs' Statutory Cause of Action Under Title VII.

Plaintiffs claim that the defendants' limitation of fringe benefits for pregnancy necessarily has a disproportionate impact upon women and therefore constitutes unlawful sex discrimination in violation of Title VII of

the Civil Rights Act of 1964.[4/] As the Supreme Court made clear in Griggs v. Duke Power Co., 401 U.S. 424, under Title VII, if an employer's policy, though neutral on its face is shown to have a disproportionate impact on a protected group, a prima facie violation of the statute is established. The employer must then demonstrate that business necessity requires the policy's application. 401 U.S. at 431.

Instead of applying this Title VII standard to test the sufficiency of plaintiffs' complaint, the district court extended the equal protection holding in Aiello to bar plaintiffs' claims under Title VII.[5/] The district

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4/ Title VII has been held to prohibit discrimination in fringe benefits in Bartmess v. Drewreys Limited U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971), cert. den., 404 U.S. 939; Rogers v. Equal Employment Opportunity Comm., 454 F.2d 234, 238 (5th Cir. 1971) cert. den. 406 U.S. 957; Rosen v. Public Service Electric and Gas Co., 477 F.2d 90, 94-95 (3d Cir. 1973); Fitzpatrick v. Bitzer, 8 EPD ¶ 9478 (D.Conn. 1974); see also Equal Employment Opportunity Comm. Guidelines, 29 CFR 1604.9, 1604.10. Addendum at pp. 57-58.

5/ It is completely unwarranted to hold that Aiello determines the sufficiency of a complaint under Title VII, especially when the Supreme Court's opinion does not refer once to Title VII or discuss even one Title VII case. In

[Fn. 5/ cont'd on p.13]

court's error was compounded by its misconstruction of the Aiello opinion, in particular, footnote 20, to be a categorical holding that classification on the basis of pregnancy (in the absence of its use as a pretext for sex discrimination) does not constitute classification on the basis of sex. 6/

Fn. 5/ cont'd from p. 12

Aiello, the only mention of Title VII, by way of analogy, is contained in the dissenting opinion of Brennan, J., 417 U.S. at 501-2.

The Supreme Court opinion in Espinoza v. Farah Mfg. Corp., 414 U.S. 85, clearly demonstrates that an interpretation of the scope of Title VII's prohibition against discrimination based on national origin required a full record, an exhaustive examination of legislative history and agency interpretations, review of comparable enactments, plus statistics and evidence concerning the particular employer whose policies were the subject of the Title VII challenge. The Supreme Court decision in Aiello cannot be reasonably interpreted as ruling on the scope of Title VII's prohibition against sex discrimination when that statute was not before it in any way.

6/ The District Court's erroneous interpretation of Aiello is discussed in Point II, infra at 36.

In treating plaintiffs' claims under Title VII as indistinguishable from the equal protection claims rejected by the Supreme Court in Aiello, the district court ignored the clear purpose and scope of Title VII to go beyond mere constitutional limitations and to create broader and more effective protections for victims of sexual and racial discrimination in employment.[7/]

Thus, the critical question here is not whether defendants' plans and policies run afoul of the prohibitions of the Equal Protection Clause,[8/] but whether Congress in enacting Title VII prohibited employers from formulating plans or policies whose effect would deprive many women of full equality in the terms, conditions or privileges of employment.

Reported decisions of three different courts - one of them the highest court of this State, have all refused to apply Aiello's equal protection holding to bar

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7/ The power of Congress to enact such legislation is clear (Katzenbach v. Morgan, 384 U.S. 641, 648), and is an exercise of Congress' broad powers under the commerce clause. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241; Satty v. Nashville Gas Co., unreported decision reproduced Addendum at 66.

8/ We show infra, Pts. II and III that they do.

pregnancy-based claims of sex discrimination under equal employment laws.

In Union Free School Dist. No. 6 v. N. Y. State Human Rights Appeal Board, unreported decision reproduced Addendum at 60, the New York Court of Appeals, in a unanimous decision, ruled that classification on the basis of pregnancy is classification on the basis of sex and is proscribed by the New York State Human Rights Law.[9/]

9/ The operative portions of that law are substantially the same as Title VII and provide as follows:

> "§ 296. Unlawful discriminatory practices.
> 1. It shall be an unlawful discriminatory practice:
>
> (a) For an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.
>
> * * *
>
> (c) For a labor organization, because of the age, race, creed, color, national origin or sex of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.
>
> * * *

The Court of Appeals specifically addressed itself to the impact of the Aiello decision on its interpretation of New York's statutory prohibition against sex discrimination in employment. Because it found the statutory prohibition to be more stringent than the 14th Amendment guarantee of equal protection, the Court of Appeals explicitly refused to extend Aiello's holding that "a sex based classification was constitutionally permissible in the context of the California issuance program" to bar a statutory cause of action for sex discrimination arising out of differential treatment of pregnancy.[10/]

Similarly, in Vineyard v. Hollister School District, 8 FEP Cases 1009 (N.D.Cal. 1974) the district court out of which Aiello arose, specifically held that discrimination claims under Title VII had to be resolved within a "different analytical framework" from that appropriate for 14th Amendment claims such as Aiello. In Satty v. Nashville Gas Co., supra, the district court again recognized that the mandates

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10/ Referring specifically to Judge Knapp's opinion below, the Court of Appeals stated directly that it did not read Aiello as did the district court.

of the 14th Amendment and Title VII were different and refused to bar plaintiff's Title VII challenge for sex discrimination growing out of classification on the basis of pregnancy.

B. Title VII Prohibits More Subtle and Unintentional Forms of Discrimination Than Does the 14th Amendment.

The Supreme Court has interpreted Title VII to prohibit not only explicit sexual classification and intentional discrimination, but also practices and policies whose effect is to limit the employment opportunities of a protected group.

In Griggs v. Duke Power Co., supra, the Supreme Court held that an employer's requirement that prospective employees possess a high school diploma or pass an intelligence test was, in effect, racially discriminatory. Because that facially neutral requirement functionally excluded a higher percentage of blacks than whites, the Court ruled that it constituted a prima facie violation of Title VII. According to the holding in Griggs, a complainant need not allege either an explicit classification on the basis of sex or a purposeful intention to

discriminate.[11] Instead, the courts look to the impact and effect of the challenged practices. A plaintiff makes out a prima facie case of discrimination by showing, as has been shown here, that the employer's policy dispro-

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11/ The district court's dismissal of plaintiffs' complaint for failure to allege intentional sex discrimination is thus wholly at variance with pleading requirements under Title VII. Intent is not a relevant factor under Title VII since the statute is directed at the "consequences of employment practices." Griggs v. Duke Power Co., supra at 432. Intent is relevant only on the issue of whether or not to award back pay. And at least seven federal courts of appeals have held that even when plaintiffs must prove intentional discrimination in order to justify an award of back pay, a prima facie case is established by showing that the challenged conduct was engaged in deliberately, as opposed to accidentally. No specific intent to discriminate need be established in order to prove an intentional violation of the act. Kober v. Westinghouse Electric Corp., 480 F.2d 240, 246 (3d Cir. 1973); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir. 1971) cert. den. 404 U.S. 991; Robinson v. Lorillard Corporation, 444 F.2d 791, 796 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006; Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970) cert. den. 401 U.S. 954; Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 996 (5th Cir. 1969) cert. den. 397 U.S. 919; Manning v. General Motors Corp., 466 F.2d 812, 815-816 (6th Cir. 1972), cert. den. 410 U.S. 946.

portionately affects members of the protected class.[12/]

Directly analogous to the present action are those Title VII cases in which prospective employees successfully challenged an employer's height or weight requirements on the ground that the standards effectively excluded women from employment. In Meadows v. Ford Motor Co., 5 EPD ¶ 8468 (D.Ky. 1973), the employer had a policy of hiring workers with a minimum weight of 150 pounds. It was shown that this requirement would exclude 80% of all females from 18 to 24 years of age while 70% of the men in that age bracket would meet the requirement. The court relying on Griggs v. Duke Power, supra, held that the employer's policy although neutral on its face, "is highly discriminatory in practice and violative of the

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12/ See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802; Wallace v. Debron Corp., 494 F.2d 674, 675-676 (8th Cir. 1974); United States v. Sheet Metal Workers, Int. Ass'n Local 36, 416 F.2d 123, 127 n.7 (8th Cir. 1969); Jones v. Lee Way Motor Freight, Inc., supra; Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426-428 (8th Cir. 1970); Witherspoon v. Mercury Freight Lines, Inc., 457 F.2d 496 (5th Cir. 1972); Johnson v. University of Pittsburgh, 359 F.Supp. 1002 (D.Pa. 1973).

Civil Rights Act. ..." Id. at p. 7270.[13/] Title VII thus imposes upon the employer an initial responsibility to assure that his practices take into account the "posture and condition" of protected groups (Griggs v. Duke Power Co., supra at 431) so that the distinctive characteristics of sex are not permissible bases for differential treatment.

In the present case, as in Griggs and the physical requirement cases, the challenged policies do not discriminate comprehensively or uniformly against women. However, they do have a disproportionate impact on a

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13/ Accord EEOC Decision 71-2643 (June 25, 1971) CCH EEOC Decisions ¶ 6286; EEOC Decision 72-0284 (August 9, 1971) CCH EEOC Decision ¶ 6304; EEOC Decision 71-1418 (March 17, 1971) CCH EEOC Decision ¶ 6223; EEOC Decision 71-1529 (April 2, 1971) CCH EEOC Decision ¶ 6231; See also State Division of Human Rights v. New York-Penn. Prof. Baseball League, 36 App. Div.2d 364, 320 N.Y.Supp. 2d 788 (4th Dept. 1971), aff'd 29 N.Y.2d 921, 329 N.Y. Supp.2d 99 (1972) State Division of Human Rights v. New York City Dept. of Parks & Recreation, 38 App.Div. 2d 25, 326 N.Y. Supp.2d 640 (1st Dept. 1951); Hardy v. Stumpf, 37 Cal. App.3d 958, 112 Cal. Rptr. 739 (1st Dist. 1974); Callery v. New York City Dept. of Parks and Recreation, 4 EPD ¶ 7593 (1st Dept. 1971).

significant portion of the protected class. See Phillips v. Martin Marietta Corp., 400 U.S. 542, where the discrimination successfully attacked was against women with pre-school-age children. As the court held in Sprogis v. United Air Lines, supra at 1198, "the effect of the statute is not to be diluted because discrimination affects only a portion of the protected class."

Indeed, the facts presented in the present case reveal a stronger Title VII challenge than those presented by Griggs and the physical requirement cases, for there the challenged requirements could have had some application to non-minority group members. Pregnancy, however, is unique to females and as a result, classification based upon it must necessarily affect only members of the protected class. Recognizing this, the court in Sprogis v. United Airlines, supra, held that "[d]iscrimination is not to be tolerated under the guise of physical properties possessed by one sex." Id. at 1198. The Fifth Circuit has adopted the same position holding that "if the ... distinction upon which the employer's selection is based inheres in the nature of an employee as a man or a woman, ... then Title VII will come to that employee's aid."

Pond v. Braniff Airways, Inc., 500 F.2d 161, 166 (5th Cir. 1974). Thus classification on the basis of pregnancy, "a natural and necessary female condition" (Vick v. Texas Employment Commission, 6 EPD ¶ 8933 [S.D. Tex. 1973]) is prima facie violative of Title VII (see cases cited, infra, at p. 33).

C. An Employer's Classification on the Basis of Pregnancy Has an Undeniable Impact Upon Women.

It goes without saying that a classification on the basis of pregnancy for the purpose of determining entitlement to fringe benefits has a disproportionate impact upon women since it can never affect men. This fact, standing alone, engenders plaintiffs Title VII claim. But distinctions based upon reproductive capacity are more than simply sex-specific. When viewed in the historical and ongoing context of discrimination against women, such distinctions must be recognized to be at the very heart of the pervasive and denigrating practices which have plagued working women.

It is critically significant to bear in mind that employment discrimination against women has long been rationalized by accepting women's distinctive reproductive

function as a basis for differential treatment. Without the protection of Title VII, employers could, as they have done historically, refuse to hire young women for positions of responsibility or to promote them to better positions because of the possibility of pregnancy. Similarly, employers could refuse to employ mothers of young children, assuming that they would necessarily be primarily responsible for raising their offspring.

Employers could, as they have done historically, terminate women, or, as was done to plaintiffs (39a-41a), place them on forced leave at some fixed point in their pregnancy. Such policies are imposed unilaterally, without regard to medical necessity, job requirements or the economic wellbeing of the pregnant employee.

A woman on nonpaid maternity leave may find, as did plaintiffs herein, that this status triggers a loss of other fringe benefits and seniority rights (40a-41a). Moreover, since no wage replacements are provided during the time the pregnant woman is physically disabled from working by pregnancy-related causes (36a-39a) and only

noninal health and hospitalization benefits are afforded (27a-33a), most women workers face the cost of hospitalization without the resources available to other disabled employees.

The months of a woman's mandatory pregnancy leave are likely to occur during a stage in her career when she must be establishing herself in the labor market, developing skills, and laying the foundation for advancement in her occupation or profession. Such a forced interruption in employment is a serious handicap to a working woman's development and job security. The woman who attempts to return to work after giving birth may find no job at all or only a lesser position available.

The short and long range effects of such employer practices upon working women, as individuals and as a class are in large measure responsible for the relegation of working women to the most inferior position in our

society.[14/] These practices deny women compensation available to their male co-workers, have an overall depressant

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14/ In 1972 the median income of women with four years of college was $8,736--exactly $100 more than the median income of men who had never even completed one year of high school. U. S. Dept. Commerce, Bureau of the Census, Current Poplulation Reports "Money Income in 1972 of Families and Persons in the United States"(P- 60, No. 87, 1973).

During 1972, earnings of full-time, year-round women workers averaged only 59.5% of men's wages. U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, "Money Income in 1971 of Families and Persons in The United States," Table 57 (P-60, No. 85, 1972).

The 1970 Report of the President's Task Force on Women's Rights and Responsibilities Entitled, A Matter of Simple Justice, 18 (1970) stated:

> "Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round full time is $7,396, of Negro men $4,777, of white women $4,279, of Negro women $3,194. Women with some college education both white and Negro earn less than Negro men with 8 years of education."

In 1972 the median income for white men working year round full time was $10,918, of Negro men $7,373, of white women $6,172, of Negro women $5,280. U.S. Department of Commerce, Bureau of the Census: Current Population Reports, "Money Income in 1972 of Families and Persons in the United States" Table 7 (P-60, No. 87, 1973).

effect on women's wages, maintain women as a cheap source of labor, and so greatly affect women's opportunities for advancement and professional development that the effects may in many instances span a woman's working life. See generally, Koontz, "Childbirth and Child Rearing Leave: Job-Related Benefits," 17 N.Y.L. Forum 480 (1971); Comment, "Love's Labors Lost: New Conceptions of Maternity Leaves," 7 Harv. Civ. Rights-Civ.Lib.Rev. 260 (1972); Cary, "Pregnancy Without Penalty," 1 Civ. Lib. Rev. 31 (1973).

Since most women work at some time during their lives and most women bear children, such policies clearly adversely affect a great number of working women. Their

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15/ During 1972, only 11% of all women aged 16 and over had never been in the labor market. U.S. Dept. of Labor, Bureau of Labor Statistics, 19 Employment and Earnings No. 7, Table 33, p. 148 (1973). There are currently over 35 million women in the labor force. U.S. Dept. of Labor, Employment Standards Administration, "Highlights of Women's Employment and Education"(August 1974).

16/ Virtually all women can become pregnant and 84% of all married women do so at least once. U.S. Dept. of Commerce, Bureau of the Census, Census of Population 1970: Detailed Characteristics, Table 212 (1971). In 1973, there were more than 4.8 million working mothers with children under six and 13 million working women with children under 18. "Highlights of Women's Employment and Education," supra.

individual loss as the result of such practices and the consequent loss to our national commerce and economic well-being are evils which Title VII was enacted to eradicate.

D. The Legislative History of Title VII Demonstrates Congress' Clear Intention to Assure to Women Full Equality in All Aspects of Employment.

Title VII was intended to provide a comprehensive guarantee of equality in employment, standing as a "charter of principles which are to be elucidated and explicated by experience, time and expertise." Rogers v. Equal Opportunity Commission, supra at 238. Congress enacted Title VII's broad and general prohibitions to serve as a strong legal foundation for the protection of the rights of disadvantaged groups to secure an equal opportunity to develop their resources and talents.

The legislative history of Title VII shows that Congress intended to protect women against much more than explicit sex discrimination. Indeed, Congress twice rejected amendments to Title VII which would have prohibited sex discrimination only if based solely on gender. See 110 Cong. Rec. 2728; 13,837 (1964).

The legislative history of the 1972 amendments to Title VII (P.L. 92-261) shows Congress' intention that the prohibition against sex discrimination be broadly construed. Congress mandated that this proscription be as liberally interpreted and vigorously enforced as is the prohibition against racial discrimination:

> "While some have looked at the entire issue of women's rights as a frivolous divertisement, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct. As a further point recent studies have shown that there is a close correlation between discrimination based on sex and racial discrimination and that both possess similar characteristics. Both categories involve large, natural classes, membership in which is beyond the individual's control, both involve highly visible characteristics on which it has been easy to draw gross stereotypical distinctions. The arguments justifying different treatment of the sexes were also historically used to justify different treatment of the races." Sen. Rep. No. 92-415 (92d Cong., 1st Sess.), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, H.R.1746, P.L. 92-261 (hereinafter "Legislative History") at 417. (Emphasis suppliod)

The Legislative History reveals that Congress recognized that the forms of sex discrimination have been varied, complex and deeply entrenched. It amply demonstrates that Congress intended that Title VII be broadly interpreted in order to eradicate the practices and policies whose discriminatory effects have historically handicapped women in the labor force. See, e.g., Sen. Rep. No. 92-415, supra; H. R. Rep. 92-238, (92d Cong. 1st Sess.) reprinted in Legislative History, supra at 65.

E. Congress Entrusted Enforcement of Title VII to a Specialized Agency Which Has Explicitly Determined That the Limitation of Health and Welfare Fringe Benefits for Pregnancy and Related Conditions Is Unlawful.

The progressive involvement of the Equal Employment Opportunity Commission ("EEOC") in the problem of sex discrimination, resulting in greater Congressional understanding of the nature and scope of the issue, was one of the most important factors leading Congress to grant the EEOC enforcement powers by the 1972 amendments to Title VII.

> "Women are subject to economic deprivation as a class. Their self fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.

> "Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII specifically prohibited sex discrimination since its enactment in 1964. The Equal Employment Opportunity Commission has progressively involved itself in the problems posed by sex discrimination, but its efforts here, as in the area of racial discrimination, have been ineffective due directly to its inability to enforce its findings." H.R.Rep. No. 92-238, supra, reprinted in Legislative History, supra at 64-65.

It was not merely the more blatant forms of sex discrimination that Congress sought to eradicate by strengthening the hand of the EEOC. Congress recognized that the perception that certain practices are discriminatory would have to be made by the EEOC in the first instance.[17/] Congress also indicated its reliance upon the EEOC for education about subtle forms of sex and racial discrimination:

> "Our original view that employment discrimination consists of a series of isolated incidents has been shattered by the evidence which shows that employment discrimination

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17/ See remarks of Senator Williams contained in the Senate Committee Report to the 1972 amendments:

> "...In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful." (Sen. Rep. No. 92-415, supra, reprinted in Legislative History, supra at 414).

> is, in most instances, the result of deeply ingrained practices and policies, which frequently do not even herald their discriminatory effects on the surface. The EEOC has stressed many times that much of what we previously accepted as sound employment policy does, in effect, promote and perpetuate discriminatory patterns....
>
> The facts speak for themselves. This nation's minorities and women continue to be treated like second class citizens..." Statement of Senator Humphrey, reprinted in Legislative History, supra at 671.

Congress, having drafted legislation, "to define discrimination in the broadest possible terms, [choosing] neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities," (Rogers v. Equal Employment Opportunity Commission, supra at 238) left to its designated agency the responsibility for implementing the Act's general prohibitions (an appropriate delegation of authority, Opp. Cotton Mills, Inc. v. Administrator, Wage & Hour Div., Dept. of Labor, 312 U.S. 126, 145).

The EEOC Guidelines on Sex Discrimination (Addendum at 57-58), issued April 5, 1972, "in accordance with the will of Congress as expressed in the Act and its legislative history" (Gilbert v. General Electric Co., 375 F.Supp. 367,

381 (E.D. Va. 1974) (Merhige, J.) (appeal pending 4th Cir., Dkt. No. 74-1557)) serve to fulfill the intention of Congress to eradicate all forms of sex discrimination in employment. They require that pregnancy-related disabilities must, for all job-related purposes, be treated the same as other disabilities under any health or temporary disability insurance or other sick leave plan available in connection with employment.

The Commission guidelines, which reflect the expertise of the agency mandated by Congress to enforce and implement Title VII, are, of course, entitled to great deference,[18] Griggs v. Duke Power Co., supra at 433-434. Phillips v. Martin-Marietta Corp., supra at 545. As a result, numerous federal courts and EEOC decisions have applied Title VII and the EEOC Guidelines to strike down employer classifications

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18/ This Circuit has relied on the policies expressed in EEOC Guidelines in determining employment discrimination challenges brought under the Fourteenth Amendment. Green v. Waterford Board of Education, 473 F.2d 624, 637 n. 19 (2nd Cir. 1973). Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm., 482 F.2d 1333, 1337 n. 6 (2nd Cir. 1973); Vulcan Society v. Civil Service Comm., 490 F.2d 387, 394 n. 8 (2nd Cir. 1973); Kirkland v. N.Y. State Dept. of Correctional Services, 374 F.Supp. 1361, 1371 (S.D.N.Y. 1974).

on the basis of pregnancy.[19/]

Any limitation on a woman's well established cause of action under Title VII for redress of differential treatment in employment on the basis of pregnancy would have disastrous results. Since Title VII remedies sex-based discrimination

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19/ See, e.g., Gilbert v. General Electric Co., supra; Wetzel v. Liberty Mutual Ins. Co., 372 F.Supp. 1146 (W.D. Pa. 1974), appeal pending (3d Cir. Dkt. No. 74-1233); Vineyard v. Hollister School Dist., supra, (rejecting employer disability plans denying benefits to pregnant women suffering pregnancy related disabilities); Lillo v. Plymouth School Bd. of Ed., 8 EPD ¶ 9510 (D.Ohio 1973); Farkas v. South Western City School Dist., 8 EPD ¶ 9619 (D.Ohio 1974); Satty V. Nashville Gas Co., supra; Hutchinson v. Lake Oswego School Dist. No. 7, 8 EPD ¶ 9578 (D.Ore. 1974); EEOC Decisions No. 74-112 (April 15, 1974) CCH EEOC Decisions ¶ 6428; EEOC Decisions No. 73-0520 (June 14, 1973) CCH EEOC Decisions ¶ 6389; EEOC Decisions No. 73-0463 (Jan. 19, 1973) CCH EEOC Decisions ¶ 6380 (rejecting employer maternity leave plans which prohibit a pregnant employee from using accrued sick leave for maternity purposes); Dessenberg v. American Metal Forming Co., 8 EPD ¶ 9575 (D.Ohio 1974) (rejecting employer maternity leave plans which interrupt seniority or trigger disqualification from other benefits); EEOC Decisions No. 73-0463, supra; EEOC Decision No. 73-0520, supra (rejecting employer maternity leave plans which set arbitrary dates beyond which pregnant employees may not work); Vick v. Texas Employment Comm'n, supra (rejecting unemployment compensation plans which deny benefits to pregnant women); Doe v. Osteopathic Hospital of Wichita, 333 F.Supp. 1357 (D.Kan. 1971) (rejecting employer policies pursuant to which female workers are discharged for pregnancy). The plans challenged by appellants herein stand on no different footing from those found violative of Title VII and the EEOC Guidelines above.

(unlike the Fourteenth Amendment which can be used to attack any classification at least if irrational), if a classification based on pregnancy is, by definition not sex-based, it could never find redress under Title VII. The result would be that in the absence of state action, an employer could classify employees on the basis of pregnancy for any purpose. There would be no basis for requiring him even to defend the minimal rationality or necessity of the classification. Although an employer may not, for example, fire employees for excessive garnishments (Johnson v. Pike Corp. of America, 332 F.Supp. 490 [C.D. Cal. 1971]) because such policies affect minorities more harshly than whites, he could, with impunity, refuse to hire pregnant women, fire them, eliminate any medical benefits for pregnancy and require forced maternity leave. Such differential treatment would be without redress under Title VII. Cf. cases cited, supra, p. 33. Such a preposterous result would follow from an affirmance of the decision below.

However, since as we have demonstrated, a classification on the basis of pregnancy is a prima facie discriminatory practice under Title VII, plaintiffs' complaint obviously states a good cause of action and the district court order of

dismissal must be reversed. The action should be remanded with instructions that plaintiffs' prima facie case can be rebutted only by a showing that the challenged policy is dictated by business necessity.[20/]

20/ It was because the district court ruled that distinctions on the basis of pregnancy are not classifications based on sex that it found no cause of action under Title VII and hence no need for the defendants to justify their conduct at all (297a). However, since the plaintiffs have stated a cause of action under Title VII, the defendants must, in response justify their challenged policies by showing "an overriding, legitimate non-[sexual] business purpose." Local 189 United Papermarkers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. den., 397 U.S. 919. This Circuit has interpreted the standard of justification on grounds of business necessity to mean that the challenged policies must be essential to the accomplishment of a legitimate business purpose. United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2nd Cir. 1971).

II

PLAINTIFFS' COMPLAINT STATES A CAUSE OF ACTION UNDER THE FOURTEENTH AMENDMENT FOR SEX DISCRIMINATION IN EMPLOYMENT WITHOUT ALLEGATIONS OF EXPLICIT OR INTENTIONAL CLASSIFICATION ON THE BASIS OF SEX.

The Supreme Court in its opinion in Aiello did not hold that classifications on the basis of pregnancy are per se lawful. It held that California's exclusion of normal pregnancy-related disabilities from a state social welfare program was not invidious discrimination (417 U.S. at 494) because it found the exclusion was justified by California's weighty and legitimate policy interests. 417 U.S. at 496. In footnote "20", the court simply noted that in social welfare legislation not every classification on the basis of pregnancy would be invidious where such classification was not explicitly sex-based (cf. Frontiero v. Richardson, 411 U.S. 677 or Reed v. Reed, 407 U.S. 71) and was not utilized as a pretext for sex discrimination. 417 U.S. 496-97, fn. 20. The court concluded that absent pretext, "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis. 417 U.S. 497, fn. 20.

In contrast, plaintiffs need not establish invidious discrimination as the result of either explicit or intentional classification on the basis of a proscribed criterion such as sex or race for equal protection challenges to discrimination in the employment context.[21] Instead, a prima facie case is established when a plaintiff shows that the challenged plans or policies have a disproportionate impact on the protected class.[22]

21/ Compare Chance v. Board of Education, 458 F.2d 116 (2nd Cir. 1972), in which a showing of disparate racial impact was the basis for plaintiff's claim of racial discrimination in employment, with Jefferson v. Hackney, 406 U.S. 535, 548, reh. den., 409 U.S. 898, in which disparate racial impact was held not sufficient to show race discrimination in the provision of legislatively enacted social welfare benefits.

22/ Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm., 482 F.2d 1333 (2nd Cir. 1973); Vulcan Society v. Civil Service Comm., 490 F.2d 387 (2nd Cir. 1973); Chance v. Board of Examiners, supra; Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 8 EPD ¶ 9678 (1st Cir. 1974); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), adhered to in relevant part en banc, id. at 327 (1972), cert. den., 406 U.S. 950; Kirkland v. N.Y. State Dept. of Correctional Services, 374 F.Supp. 1361 (.S.D.N.Y. 1974, Lasker, J.); Smith v. City of East Cleveland, 363 F.Supp. 1131 (D. Ohio 1973). See also Alexander v. Louisiana, 405 U.S. 625.

Consequently, the factors which the Court noted in Aiello to show that a classification on the basis of pregnancy was not tantamount to explicit sex based classification are irrelevant here. In the employment context, a prima facie case does not require exclusive or exhaustive classification of the protected group if the group excluded by operation of the classification is comprised disproportionately of members of the protected group.[23] Chance v. Board of Education, supra; Castro v. Beecher, supra. A prima facie case does not require a total denial of benefits to those members of theprotected group who are excluded, Green v. Waterford Board of Education, 473 F.2d 629 (2nd Cir. 1973). Nor need the challenged plan be based upon something other than an objective physical

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23/ The impact of a classification is measured by how effectively it operates to exclude only members of the protected class. For instance, the exclusion from an employer's medical insurance policy of sickle cell anemia, (a disease experienced primarily by blacks in this country) would, by virtue of its impact, be prima facie racially discriminatory. If an employer made an objective classification of employees on the basis of skin pigmentation to determine who could work outdoors in strong sunlight without serious risk of skin cancer, assignment of employees on this basis would be prima facie racially discriminatory.

condition.[24] Smith v. City of East Cleveland, supra. The plan to be challenged need not explicitly prefer the non-protected group. Green v. Waterford Board of Education,[25] supra. Finally, there is no requirement that the plan be explicitly discriminatory or intentionally motivated.

24/ Any classification is of course based on an obvious difference. Differences of race and sex are primarily objective physical conditions, nothing more nor less. It is precisely because race and sex provide objective physical criteria for differentiation which are believed to be unrelated to an individual's rights to equal treatment, that the Constitution prohibits an employer from distinguishing between employees on the basis of possession or absence of any of the set of sexual or racial characteristics. For example, if an employer in addition to excluding disabilities relating to normal pregnancy, excluded all pregnancy-related disabilities, disabilities associated with breast or uterine cancer, disabilities resulting from hysterectomy, disabilities relating to menopause, disabilities caused by pelvic inflammatory disease and vaginal infection, disabilities resulting from surgical procedures for removal of ovarian cysts and filbroid tumors, a claim of sex discrimination would certainly lie.

25/ The requirement that men be explicitly preferred in order for there to be sex discrimination depends on the premise that discrimination can occur only when two groups are treated differently with regard to the very same condition. Acceptance of this premise is another way of requiring that there be explicit gender classification. It would either ignore the fact that real differences do exist between sexes or among races or permit such differences to be a permissible basis of distinctions.

Chance v. Board of Examiners, supra.[26/]

Pregnancy and its related disabilities are, like other physical conditions, "objectively identifiable...with unique characteristics." Geduldig v. Aiello, supra at 496, fn. 20. Paramount among the unique characteristics is the obvious fact that the condition is peculiar to the female sex. As a result, classification on the basis of this condition has an impact upon a significant number of working women and of necessity a disproportionate impact upon women since it affects only women. (See discussion, Pt. I, B, supra at p.17). Because the exclusion challenged here is not one enacted legislatively in a social welfare context and supported by weighty public policy, as was the exclusion in Aiello, the disparate impact of defendant's plans constitute prohibited sex discrimination. In the employment

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26/ The Equal Protection Clause provides redress for unintentional, i.e., non-malicious discrimination. This Court has held that the protection afforded by the Fourteenth Amendment is not exhausted by intention discrimination or the discriminatory application of neutral regulations. Substantial discriminatory impact, even if unintended will give rise to a cause of action under the equal protection clause. Chance v. Board of Examiners, supra; Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm., supra; Vulcan Society v. Civil Service Comm., supra. Cf., Long v. Ford Motor Company, 496 F.2d 500 (6th Cir. 1974). Thus the district court's dismissal of plaintiffs' complaint for failure to allege that defendants' classification is a pretext for sex discrimination or intentionally motivated must be reversed.

context, numerous equal protection challenges for discrimination on the basis of sex have been successfully litigated in the context of differential treatment of pregnant employees.[27/]

The distinction between classification in the employment context, where impact establishes a prima facie case, and classification in the social welfare context, where intentional discrimination must be shown, is justifiable because of the great deference which must be accorded a state in its determination of interest and priority in the selection of plans and policies to insure

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27/ See, e.g., Green v. Waterford Board of Education, supra; Buckley v. Coyle Public School System, 476 F.2d 92 (10th Cir. 1973); Monell v. Dept. of Social Services of City of N.Y., 357 F.Supp. 1051 (S.D.N.Y. 1972); Seaman v. Spring Lake Park Independent School Dist., 363 F.Supp. 944 (D. Minn. 1973); Heath v. Westerville Board of Education, 345 F.Supp. 501 (S.D. Ohio 1972); Williams v. San Francisco Unified School Dist., 340 F.Supp 438 (N.D. Cal. 1972); Pocklington v. Duvall County School Board, 345 F. 163 (M.D. Fla. 1972); Black v. School Committee of Malden, 8 EPD ¶ 9659 (Sup. Ct. Mass. 1974); Scott v. Opelika City Schools, 7 EPD ¶ 9375 (M.D. Ala 1974); Paxman v. Wilkerson, 5 EPD ¶ 8546 (D. Va. 1972); Bravo v. Board of Education of City of Chicago, 345 F.Supp. 155 (N.D. Ill. 1972). See also Cleveland Board of Education v. LaFleur, 414 U.S. 632; Hanson v. Hutt, 83 Wash.2d 195, 517 P.2d 599 (Wash. Sup. Ct., en banc, 1973).

the health and welfare of its citizens.[28] "[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." Dandridge v. Williams, 397 U.S. 471, 486. See also Buck v. Bell, 274 U.S. 200, 208. However wisely or unwisely the legislature in fact exercises its power, it must be accorded a great deal of latitude in the selection of legislative goals and in the formulation of plans and policies to accomplish them. Jefferson v. Hackney, supra at 546; Dandridge v. Williams, supra at 485; Aiello, supra at 495.

This deference to a state's determination of social policy is founded primarily in the political concept of federalism, San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, reh. den., 411 U.S. 959; cf., Younger v. Harris, 401 U.S. 37, 41. It has no application

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28/ In Aiello, Justice Stewart analyzed the challenged disability plan in terms of the articulated state policies underlying the decision to exclude pregnancy: the benefit level deemed appropriate to compensate individuals; the selection of risks to be insured; the contribution rate chosen to maintain the solvency of the program without overburdening contributors. Each of these policies was peculiarly appropriate for a state's consideration in its attempt to dispense finite resources to accomplish some social welfare policy objective.

in an employment context where the state is not exercising its power parens patriae, but is simply furnishing employees with compensation for services performed.[29] An employer, whether private or public, does not determine the social policy objectives of any governmental unit and therefore, its plans affecting the health and welfare of employees are entitled to no automatic deference.

There is nothing in the Aiello opinion, nor could there be, which would immunize classifications on the basis of pregnancy from equal protection challenges. Aiello simply holds, like Jefferson v. Hackney, supra, that in the context of social welfare legislation, the disparate impact of a facially neutral classification on a protected group does not state a prima facie case of discrimination. Aiello cannot be read to hold that the impact of such a classification is disregarded altogether, regardless of factual context, without completely revising traditional equal protection analysis.

What has taken such a long and painful time to understand -- that discrimination may be subtle, inadvertent

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29/ This distinction is implicit in the 1972 amendments to Title VII extending its coverage to government employees.

and particularly difficult to eradicate -- must not be forgotten by the hasty adoption of hollow semantic concepts masquerading as statements of reality and principles of justice. In the area of sexual differences, we all carry a legacy of prejudice. As this Court noted: "One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or gone unnoticed," Green v. Waterford Board of Education, supra at 634. As a result, it is particularly important to adhere to a method of analysis which tests for discrimination by gauging the practical effect of a classification rather than by looking to the motive for its adoption. The rule must be applied here that since the challenged classification on the basis of pregnancy has a differential impact upon women workers, that alone indicates the possible presence of prohibited discrimination. Plaintiffs' complaint thus states a good cause of action and the district court order of dismissal must be reversed.

III.

PLAINTIFFS' COMPLAINT STATES A CAUSE OF ACTION UNDER THE 14TH AMENDMENT FOR INVIDIOUS DISCRIMINATION AGAINST PREGNANT WOMEN.

Defendants offer municipal employees a fringe benefit package to provide health and medical insurance, wage replacement disability payments and leaves of absence for workers who suffer from some physical condition which temporarily incapacitates them.

The temporary disability, hospitalization, medical services and absence from work incident to pregnancy and its related conditions are no different from those resulting from other covered conditions requiring medical attention and disabling an employee from carrying on his or her normal work and earn normal wages for a limited period of time. Green v. Waterford Board of Education, 473 F.2d 629, 634 (2d Cir. 1973). Like some other conditions, pregnancy may be voluntary (e.g., attempted suicide, obesity), like others, it may result from a characteristic unique to one sex (e.g., prostatectomy, hemophilia). All such conditions may result in necessary absence from work, loss of income and increased medical expenses, the very

problems which the defendants' health and welfare fringe benefit programs were designed to alleviate. Thus pregnant employees are identically situated with other disabled employees in relation to the employer's compensatory purpose.

Defendants have determined to exclude pregnancy and related conditions from coverage under compensatory fringe benefit programs. According to this court's decision in Green v. Waterford Board of Education, supra, close scrutiny of the justifications advanced in support of this classification would be required. Nevertheless, the district court below refused to require defendants to offer any justification for their exclusion and as a result it is impossible to judge the relation between the exclusion and any supporting policies or to determine whether any policies are suitably furthered by the exclusion.[30/]

30/ The record in the present case presents no facts which would enable this court to determine: what legitimate interest the classification promotes; whether the classification has a fair and substantial relation to the employer's object; whether a legitimate employer's interest is suitably furthered by the classification. Cf. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 173; Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95; U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534; Reed v. Reed, 404 U.S. 71, 76; Dunn v. Blumstein, 405 U.S. 330, 335.

However, Aiello may be interpreted, it certainly does not hold that there are no circumstances in which classification on the basis of pregnancy may be impermissible. At a minimum, defendants are required to come forward with a "legitimate, articulated state purpose" for their exclusion of pregnancy.[31] McGinnis v. Royster, 410 U.S. 263, 270. Recent Supreme Court decisions show that flimsy, saving rationales will no longer be ingeniously manufactured by the courts. See, e.g., James v. Strange, 407 U.S. 128. Cf. Green v. Waterford Board of Education, supra at 634.

Moreover, the plans on their face, adversely affect fundamental personal rights. For this reason defendants' exclusion can only be upheld if shown to be precisely and narrowly drawn to accomplish a particular legitimate, non-discriminatory purpose. Police Dept. of Chicago v. Mosley, supra at 101, Dunn v. Blumstein, supra at 342-3. Sugarman v. Dougall, 413 U.S. 634, 643; Memorial Hospital v. Maricopa County, 415 U.S. 250; Shapiro v. Thompson, 394 U.S. 618, 631.

The plans challenged here restrict the exercise of the right to employment and the right to bear offspring.

31/ The district court was aware of this requirement (287a, 298a), but nevertheless, dismissed plaintiffs' complaint on its face.

The United States Supreme Court has ruled in such a situation that laws or regulations "must not needlessly, arbitrarily, or capriciously" impinge upon these vital areas of constitutional liberty. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 640.

Freedom from discrimination in employment is a fundamental aspect of personal liberty. Truax v. Raich, 239 U.S. 33, 41; Yu Cong Eng v. Trinidad, 271 U.S. 500; Adams v. Tanner, 244 U.S. 590. As a result, the actions of a state as an employer which discriminate against a particular group of employees are subject to close judicial scrutiny. It is difficult to conceive of a state interest which would permit a government employer to pay pregnant women less than other employees. Equality in the provision of fringe benefits stands on the same footing.[32/]

32/ It would be "incongruous to say that the justification for denying the benefits is that it is cheaper not to give them. ... If all that is required to uphold a[n exclusion] is the conclusion that it is more economical to deny benefits than to extend them, then any [exclusion] can be established and no disqualified group can complain." Frontiero v. Laird, 341 F.Supp. 201, 210-11 (M.D.Ala. 1972, dissenting opinion) rev'd sub nom. Frontiero v. Richardson, 411 U.S. 677.

Once an employer chooses to recompense the event of hospitalization, provide temporary benefits for disabled workers, or provide leaves for employees who must absent themselves from work, he must do so for all on an equal basis. Gomez v. Perez, 409 U.S. 535, 538. Cf. Cleveland Bd. of Education v. LaFleur, 414 U.S. 632.

The other fundamental right involved by defendants' exclusion is the right to bear a child. State action touching on personal rights concerning marriage, procreation, contraception and abortion is closely scrutinized under the Fourteenth Amendment. Skinner v. Oklahoma, 316 U.S. 535; Roe v. Wade, 410 U.S. 113, 153; Eisenstadt v. Baird, 405 U.S. 438.

It is only female employees who, if they wish to avoid a total loss of company induced income and other benefits must forego the right and privilege of bearing children. Forced maternity leave keeps them from continuing to work while pregnant, interrupts seniority and triggers disqualification from still other fringe benefit plans. Exclusive disability benefit plans provide them with no compensation when they are physically incapable of working

even if the disability is the result of a seriously complicated pregnancy or childbirth. Limited hospitalization insurance provides only nominal reimbursement for hospital expenses incurred in connection with childbirth and pregnancy. Thus the expectant mother, now unemployed and disqualified from temporary disability benefits must somehow find the income to meet necessary medical expenses as well as the additional costs required for proper care of herself and her offspring.

Since most women work because they must[33] and since many women who head households are often poverty stricken,[34] their exclusion from health and welfare fringe benefits works a particularly serious financial hardship.

33/ Nearly two-thirds of all women who work do so because they must - either they are alone or their husbands earn less than $7,000 a year. U. S. Dept. of Labor, Employment Standards Administration, The Myth & The Reality (May 1974).

34/ In New York City in 1969, the median income of households headed by females was $4,624 in contrast with $11,255 for households headed by males. U.S. Dept. of Commerce, Bureau of the Census, U.S. Summary of 1970 Census: Detailed Characteristics, Table 367 (Feb. 1973). In 1972, women headed 2,100,000 impoverished families. U.S. Dept. of Labor, Employment Standards, Women's Bureau, Facts About Women Heads of Households and Heads of Families, 8 (April 1973).

Moreover, the inability of some women to meet the financial costs of pregnancy and childbirth may be a contributing factor to the high rates of infant and maternal mortality in this country.[35] It has been shown that risks attending pregnancy and childbirth are higher for women and children of low-income families[36] and thus, while the provision of limited health and welfare fringe benefits for working mothers may result in substantial monetary savings for an employer, it may contribute to the far more costly loss of health and even life.[37]

35/ Pregnancy and puerperium are still among the leading causes of death for American women of child-bearing age. Warren M. Hern, M.D., "Is Pregnancy Really Normal?" 3 Family Planning Perspectives, 5, 8 (January 1971). The maternal mortality rate in the United States for 1968, 1969 and 1970, respectively was 24.5, 27.4 and 24.7 deaths per 100,000 live births. U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States, 57 (1972). In 1972, the infant mortality rate was 18.5 for 1,000 births (placing the United States 32nd worldwide). United Nations Statistical Yearbook, Table 19, p. 81 (1973).

36/ See generally "A Study of Risks, Medical Care and Infant Mortality," 63 Am.J. Public Health (Sept. 1973 supp.).

37/ The City of New York as an employer may bear part of the cost of resulting loss of health in later payments for medical attention, disability and sick leave.

IV. DEFENDANTS' CHALLENGED PLANS AND POLICIES VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Defendants' plans and policies are violative of the Due Process Clause of the Fourteenth Amendment because they arbitrarily infringe upon the exercise of personal liberties.

In Cleveland Board of Education v. LaFleur, 414 U.S. 632, the Supreme Court held unconstitutional a forced maternity leave policy similar to the one plaintiffs challenge here. The Supreme Court, basing its decision on the right to be free from unwarranted government intrusion in matters relating to child bearing, held that teachers could not arbitrarily be denied the right to continue working during their pregnancy. This decision clearly requires the reversal of the district court's dismissal of plaintiffs' allegations that defendants require pregnant employees to stop working at a fixed time during pregnancy regardless of an individual woman's desire, ability or need to continue working (39a-42a).[38/] The district court below, ignoring

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38/ The fact that plaintiffs' complaint primarily alleges discrimination under Title VII and the equal protection

[Fn. 38/ cont'd next page]

entirely the Supreme Court ruling in Cleveland Board of Education v. LaFleur, supra, dismissed plaintiffs' claims regarding forced maternity leave.

Defendants' plans and policies regarding other health and welfare fringe benefits similarly constitute an unwarranted burden on a female employee's liberty to bear children. As we have urged earlier (see Pt. III at p.45), these plans, taken together, not only limit a

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Fn. 38/ cont'd from p.52

clause does not preclude the court's recognizing this due process cause of action under theories of notice pleading. Concepts of due process and equal protection are closely related. Bolling v. Sharpe, 347 U.S. 497; Cleveland Board of Education v. LaFleur, supra; Frontiero v. Richardson, 411 U.S. 677. Indeed, the lower court decisions in Cleveland Board of Education v. LaFleur, supra, all focused on the denial of equal protection rather than the due process issue. It was not until the case was at the Supreme Court that the issues were analyzed in due process terms. Moreover, since the LaFleur decision came down after plaintiffs' complaint was filed, plaintiffs should at least be permitted to amend their complaint to allege a cause of action for denial of due process if that omission is considered serious. The court's leave to replead below was given only to allege intentional sex discrimination (30a).

prospective mother's right to participate in the procreative experience if she desires to continue working, they also deprive her of needed financial support and medical services without which her own health and that of her offspring is seriously jeopardized.

Because the district court dismissed plaintiffs' complaint without requiring defendants to justify these policies, the order of dismissal must be reversed. The defendants' treatment of pregnant employees can only be upheld if it advances a legitimate interest and is narrowly drawn so that it does not unnecessarily infringe on fundamental rights. Cleveland Board of Education v. LaFleur, supra; Roe v. Wade, 410 U.S. 113, Bolling v. Sharpe, supra.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE COURT SHOULD REVERSE THE ORDER OF THE DISTRICT COURT BELOW DISMISSING PLAINTIFFS' COMPLAINT.

Dated: New York, New York
December 27, 1974

Respectfully submitted,

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*/ Plaintiffs-Appellants appreciate the assistance of Carol Gerstein and Martha Gores, second year students at New York University Law School.

ADDENDUM

Constitutional Provisions, Statutes and Regulations Involved

The FOURTEENTH AMENDMENT to the United States Constitution provides in relevant part:

> "Section 1: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The CIVIL RIGHTS ACT of 1971, 42 USC § 1983 provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title VII of the Civil Rights Act of 1964 as amended, 42 USC § 2000(e)2, et seq., provides in relevant part:

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

[Unlawful Practices of Employers]

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(c) It shall be an unlawful employment practice for a labor organization --

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The Guidelines of the Equal Opportunity Employment Commission, 29 CFR 1604.9 et seq. provide in relevant part:

Sec. 1604.9 Fringe Benefits.--(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

* * *

(e) It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefit is greater with respect to one sex than the other.

* * *

Sec. 1604.10 Employment Policies Relating to Pregnancy and Childbirth.

* * *

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.

Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

State of New York
Court of Appeals

2 No. 505
Union Free School District No. 6 of the Towns of Islip and Smithtown, et al., Appellants,
vs.
New York State Human Rights Appeal Board, et al., & Hauppauge Classroom Teachers' Association, Respondents.

OPINION

JONES, J.:

This appeal presents another facet of the question whether under the Human Rights Law (Executive Law, art. 15) pregnancy and childbirth may be treated differently in an employment relationship from other instances of physical or medical impairment or disability. We have held that a personnel policy which singles out pregnancy, among all other physical conditions to which a teacher may be subject, as a category for special treatment in determining when leave from duty shall begin is prohibited by the proscriptions of our State's Human Rights Law (Board of Education, East Williston v. Division of Human Rights, 35 N Y 2d ___ [decided October 7, 1974], affg. 42 A D 2d 49). Likewise, we have held that the Human Rights Law requires that a pregnant teacher who takes a pregnancy-related leave must be permitted to take advantage of her sick and sabbatical leave entitlements to the same extent as would be the case were she suffering from some other temporary physical disability (Board of Education City of New York v. Division of Human Rights, 35 N Y 2d ___ [decided October 7, 1974], affg. 42 A D 2d 854).

In reaching these determinations we were not unmindful of the decision of the Supreme Court of the United States in Gedulig v. Aiello, ___ U.S. ___, 42 U.S.L.W. 4905, 94 S. Ct. 2485. The argument was pressed on us that the Supreme Court had there upheld a California statute establishing an employee disability benefits program which explicitly excluded disabilities resulting from normal pregnancy and childbirth. Such discriminatory classification having been upheld against constitutional challenge in Aiello we were told that the same classification should not then be struck down in the cases before us.

The legal issue in Aiello, however, was quite different from that which we confronted. In Aiello the court concluded that the Equal Protection Clause of the Federal Constitution did not preclude a state legislature from adopting the pregnancy-childbirth classification which was "rationally supportable" in a social welfare program. Thus, a sex-based classification was held to be constitutionally permissible in the context of the California insurance program.

A quite different question was put to us. New York had adopted a statute expressly forbidding discrimination based on sex, a classification which while not foreclosed by constitutional prohibition could be proscribed by legislative enactment. The question we faced then was whether the personnel policies and practices in the cases before us transgressed our statutory proscription. That they might not be constitutionally forbidden was irrelevant.

The distinction between constitutional proscription and statutory interdict is illustrated by two recent cases in the Supreme Court. In Kahn v. Shevin, ___ U.S. ___, 42 U.S.L.W. 4591 the Court held that constitutional entitlements did not preclude the State of Florida from allowing a tax exemption to widows but not to widowers. By contrast in Corning Glass Works v. Brennan, ___ U.S. ___, 42 U.S.L.W. 4827, the Court construed the Equal Pay Act (29 U.S.C. § 206) to require an employer

to pay female inspectors on the day shift as much base pay as was paid to male inspectors on the night shift. In applying Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) the federal courts in several instances have found a classification permitted to lawmakers under the Equal Protection Clause, forbidden to employers under Title VII. (E.g., compare Muller v. Oregon, 208 U.S. 412, and West Coast Hotel Co. v. Parrish, 300 U.S. 379, with Weeks v. Southern Bell Telephone and Telegraph Co., 408 F 2d 228; see also Richards v. Griffith Rubber Mills, 300 F. Supp. 338 ["The particular classification in Order No. 8 may be reasonable under the Equal Protection Clause, but it is no longer permitted under the Supremacy Clause and the Equal Employment Opportunity Act." p. 340]; Wetzel v. Liberty Mutual Insurance Co., 372 F. Supp. 1146 ["While a fixed State policy of classification may survive an equal protection attack it may still be violative of Title VII." p. 1159]).[1]

As Mr. Justice James D. Hopkins wrote in Board of Education, East Williston, supra:

> "*** the test to be applied here is not the constitutional standard under the equal protection clause, but the statutory standard of the Human Rights Law. The Human Rights Law is undoubtedly a function of the equal protection guarantee, but it reflects a more direct and positive focus." 42 App. Div. 2d, at 52.

In sum, what the constitution does not forbid may nonetheless be proscribed by statute. In East Williston and City of New York, supra, it had been. The case now before us is no different.

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1. Two federal district courts have read the opinion in Aiello as holding that a classification excluding pregnancy and childbirth is not sex-based -- Communications Workers of America, AFL-CIO v. American Telephone and Telegraph Co. (S.D.N.Y., No. 73 Civ. 3353 and No. 74 Civ. 304, July 30, 1974) [an action under Title VII of the Civil Rights Act, involving, as here, a question of a statutorily proscribed discrimination]; and Seamen v. Spring Lake Park Independent School District (D. Minn., No. 4-73 Civ. 23, July 29, 1974) [an action under 42 U.S.C. & 1983, involving a question of deprivation of constitutional rights rather than a question of statutorily prohibited discrimination, thus the same issue as in Aiello]. We do not read Aiello as do these District Courts. In any event, were the Supreme Court to declare that exclusion of pregnancy and maternity benefits was to no extent based on sex, we would not be obliged to accept such determination for the purposes of the application of our State's Human Rights Law.

The new aspect presented in this record is whether a different and more restricted standard is to be applied under the Human Rights Law when the personnel policy in question was the product of bilateral negotiations under the Taylor Law (Civil Service Law, art. 14). The personnel policy involved here would single out childbirth among other physical conditions for special treatment in fixing terms of compensation and of return to employment thereafter.[2] Appellant contends that when the personnel policy, rather than having been unilaterally promulgated by the employer as in Board of Education, East Williston, and Board of Education, City of New York, supra, has been reached under the auspices of the Taylor Law, it may then be struck down only on proof that the policy is "patently and palpably discriminatory". Appellants also raise two procedural issues which warrant our attention.

The argument in sum is that contract provisions reached under Taylor Act procedures are entitled to a special status recognition under our decision in Board of Education, Huntington v. Teachers, 30 N Y 2d 122. We recently noted that the language of our opinion in that case might be read too broadly and that "[o]ne should construe the language in [that case] to mean that collective bargaining under the Taylor Law *** has broad scope with respect to the terms and conditions of employment, limited by plain and clear, rather than express, prohibitions in the statute or decisional law" (Syracuse Teachers Association v. Board of Education, 35 N Y 2d ___ [decided October 23, 1974]).

We now hold that personnel policies and practices are no less subject to the constraints of the Human Rights Law because they are the product of negotiations conducted under the Taylor Law. (Cf. Camillus Central School District v. Division of Human Rights, 44 A D 2d 774; Matter of Board of Education, Babylon v. Division of Human Rights, 43 A D 2d 31.)

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[2] The rationale of Board of Education, East Williston, supra, permits of no legal distinction for purposes of application of the Human Rights Law between policies with respect to pregnancy and policies with respect to childbirth, and no contention is made to the contrary.

In so holding we adopt the relevant portions of the opinion of Mr. Justice Hopkins in Matter of Board of Education, Babylon, supra, at pages 34 to 36, noting in passing that no claim of waiver or estoppel is here advanced or therefore reached.[3]

We also reject appellant's procedural contention that the Division of Human Rights lacked jurisdiction here by reason of the complainant's failure to comply with the notice-of-claim provisions of Section 3813(1) of the Education Law:

> 1. No action or special proceeding, for any cause whatever, except as hereinafter provided, relating to district property or claim against the district, or involving its rights or interests shall be prosecuted or maintained against any school district, board of education, board of cooperative educational services or any officer of a school district, board of education, or board of cooperative educational services, unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

It appears that not all actions and special proceedings have been held to be subject to the prerequisites of § 3813(1).[4] The pertinent distinction is between actions and proceedings which on the one hand seek only enforcement of private rights and duties and those on the other in which it is sought to vindicate a public interest; the provisions of § 3813(1) are applicable as to the former but not as to the latter. This dis-

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3. While principles of waiver or estoppel might foreclose relief to an individual complainant in a particular instance, it would seem that action taken by or on behalf of an individual complainant could never operate to foreclose action by the Division.

4. E.g., Ruocco v. Doyle, 38 A D 2d 132 (action by school principal seeking declaration of his tenured status), DiSano v. Stordandt, 43 Misc 2d 272, revd. on other grounds, 24 A D 2d 6 (action to restrain school district from effectuating plans for open enrollment); Newburgh Nursery, Inc. v. Board of Education, 41 Misc 2d 376 (action to foreclose mechanic's lien); Levert v. Central School Dist., Huntington, 24 Misc 2d 832 (taxpayer action seeking declaration that central school district violated its statutory duty following centralization to maintain schools up to and including sixth elementary grade); Matter of Randall v. Hoff, 4 Misc 2d 376 (taxpayer's action for change in plans for construction of a new high school).

tinction has been recognized by our Court in other settings (New York State Labor Relations Board v. Holland Laundry, Inc., 294 N. Y. 480, 495; Syracuse Teachers Association v. Board of Education, 38 A D 2d 245, 248, affd. 35 N Y 2d ___, supra). It is true, of course, that this proceeding was triggered by the complaint of this one teacher and that the relief granted below will redound to the benefit of that teacher as well as to the benefit of other teachers similarly situated. Such circumstances cannot be allowed, however, to obscure the fact that advantages which accrue to these teachers stem not from their rights of contract or other individual entitlement but rather flow as an appropriate and intended consequence of the vindication by the Division, acting on behalf of the public, of the public's interest in the elimination of discrimination based on sex -- a public interest duly declared by legislative enactment.

We note additionally and in any event that the procedures under the Human Rights Law afford the School District notice and opportunity for adjustment and settlement of the issues here in dispute not unlike those to which the Board would have been entitled under § 3818(1).

Finally, we see no sufficient ground in legislative history or otherwise to differ with the conclusion reached in each of the four Departments of the Appellate Division that the time schedules specified in subdivisions 2, 4(a) and 4(c) of section 297 of the Executive Law for the performance of certain acts on the part of the Division of Human Rights are directory only. Metropolitan Life Ins. Co. v. State Division of Human Rights, 37 A D 2d 761 (First Dept.); Mtr. of Glen Cove Mun. Civ. Serv. Comm. v. Glen Cove NAACP, 34 A D 2d 956 (Second Dept.); Mtr. of 121-129 Broadway Realty, Inc. v. State Division of Human Rights, 43 A D 2d 754 (Third Dept.); Mtr. of Moskal v. State Division of Human Rights, 36 A D 2d 46 (Fourth Dept.); cf. State Division of Human Rights v. Rinas, 42 A D 2d 388. The time limits are evidently for the benefit of complainants and others benefitted and cannot be held to shelter those charged with violation of the Statute. Absent some showing of substantial prejudice, non-compliance with such schedules does not operate

to oust the Division of the jurisdiction conferred on it by the Human Rights Law. We find no predicate for any such ouster in this record.

Accordingly, there being substantial evidence to support the determination of the Commissioner that the School District's action constituted discrimination based on sex, the order of the Appellate Division should be affirmed.

* * * * * * * * * *

Order affirmed, with costs. Opinion by Jones, J. All concur.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NORA D. SATTY :
:
v. : No. 74-288-NA-CV
:
NASHVILLE GAS COMPANY :

MEMORANDUM

This cause of action was brought pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq.) alleging sex discrimination in defendant's employment policies with respect to pregnancy. Plaintiff seeks back wages, lost benefits, attorney's fees and injunctive relief. Plaintiff further alleges that her employment was terminated because she complained about the allegedly discriminatory policies.

There is no dispute as to the jurisdiction of this court under Title VII of the Civil Rights Act of 1964.

Originally the cause was brought as a class action. However, the parties stipulated that the number of persons whom plaintiff may properly represent is not sufficiently numerous to permit maintenance of a class action under Rule 23, Federal Rules of Civil Procedure.

Simultaneously with filing of this action, plaintiff filed a motion for entry of a preliminary injunction requiring defendant to reinstate her as an employee and enjoining defendant from retaliatory measures. A hearing was held upon plaintiff's motion on July 10, 1974. At the close of the hearing, the court determined that a preliminary injunction would not be issued because plaintiff failed to establish that irreparable harm would be suffered by denial of the motion and it appeared that monetary damages could compensate plaintiff for any injury she might suffer.

The threshold question is whether or not defendant's employment policies, with respect to pregnancy, constitute unlawful sex discrimination.

I.

The parties have stipulated as to the following statement describing defendant's policy of health insurance:

> As a condition of employment, every employee of Nashville Gas Company is required to be covered under a group life, health and accident policy issued by Provident Life and Accident Insurance Company. The cost of such policy is borne half by the Company and half by the employees. In addition to other health and hospitalization benefits, said policy also provides for payment of 50% of the customary and reasonable fees incurred in connection with pregnancy. Such pregnancy benefits apply to female employees and dependent wives of male employees. Although the insurance plan terminates with respect to an employee at the time such employee's active employment ceases, the maternity benefits continue to apply for up to nine months after termination and if such benefits would have been payable had delivery occurred on the date such active employment ceases.

Plaintiff's theory is that defendant's group insurance program discriminates on the basis of sex because a reduced benefit is paid in the case of pregnancy when compared with hospitalizations for other causes. There is no doubt that the insurance program makes a distinction in the case of pregnancy as to the extent of benefits available. However, the pregnancy distinction applies to both male and female employee-beneficiaries of the plan. The insurance proceeds are paid on behalf of the employee, male or female, according to a single formula in all pregnancy cases. Thus, for a male employee whose wife is pregnant, the insurance benefit is the same as provided to a pregnant female employee such as plaintiff.

The parties further stipulated that pregnancy is a temporary disabling condition resulting from a normal bodily function. In this case the plaintiff had a normal pregnancy and childbirth. Also, the parties have agreed that defendant does not have a disability insurance plan for its employees. This is not a situation where a female employee receives a lesser benefit for her disability than those received by males. Defendant's insurance plan pays no benefit whatsoever for disabilities. The only benefit under defendant's insurance plan is for payment of medical expenses. The issue in this case is whether defendant's insurance program discriminates unlawfully between male and female employees in the payment of medical expenses.

No evidence has been introduced to show a failure on defendant's part to comply with the Equal Employment Opportunity Commission guidelines on fringe benefits. Title 29, Code of Federal Regulations, Section 1604.9(d) provides:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not available for female employees; or to make available benefits to the husbands of female employees which are not available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

So far as the issue relating to the insurance program is concerned, the court finds no distinction in the application, operation, or effect of the insurance plan to support a finding of unlawful discrimination by reason of sex since all employees, male or female, receive the same benefit.

II.

It has been and is now the policy of defendant to require pregnant employees to take maternity leave. Although defendant's "Employee Policy Manual," of September 27, 1971, presents availability of maternity leave in permissive terms, to wit:

> In case of pregnancy, an employee, upon written request may be granted a leave of absence. . . (emphasis added)

actual practice demonstrates that a pregnant employee may not decline to accept maternity leave, and still retain employee affiliation with the defendant company. Once an employee is placed in maternity leave status, she may remain in that status for up to one year. There is no statement of policy concerning the status of an employee on maternity leave who is unable to return to work after one year. A fair inference is that such an employee would be terminated.

Once an employee is classified as being in a leave status, i.e., leave of absence or pregnancy leave, it is defendant's policy to offer such an employee temporary work, when available, until a permanent position is open. After an employee returns from leave status and acquires permanent employment, the defendant credits such person with seniority previously accumulated for the purposes of pension, vacation, and other employee benefits based on senority. However, defendant does not credit an employee returning from leave status who is subsequently classified as a temporary or permanent employee with previously accumulated seniority for the purpose of bidding on job openings. The significance of this policy is illustrated in the present case where plaintiff returned from pregnancy leave as a temporary employee after more than four (4) years of continuous employment, next preceding maternity leave, and defendant failed to place her in one of several permanent job openings. All of these openings were filled by other employees credited with greater job-bidding seniority even though plaintiff had the earlier date of initial

employment. It appears that seniority is the primary factor in the job bidding process and failure to credit plaintiff with seniority for this purpose is the sole reason she failed to gain a permanent position with defendant following her return from maternity leave.

Defendant asserts that the job bidding policies are the same for all employees, male or female, returning from a leave status.

The gravamen to defendant's contention is that only pregnant women are required to take leave. In all cases other than maternity the decision to take leave is entirely a voluntary matter with each employee.

It further appears that defendant maintains a policy of allowing leave in connection with non-work related illness or injury without loss of seniority or other indicia of good standing on the part of an employee where the non-work related disability does not concern pregnancy. It is only in the case of pregnancy that an employee is denied the opportunity to take "sick leave."

Defendant does not have a disability insurance plan for its employees, but does provide a specific number of sick leave days based on the employee's seniority. Employees, like plaintiff, who are placed on pregnancy leave are not paid for accumulated sick leave, but are paid for accumulated vacation time. Defendant's policy has been to allow employees who have been absent due to illness or non-work related disabilities to take "sick leave." Only in the case of pregnancy is an employee denied the right to take sick leave. It further appears that employees returning from long period of absence due to non-job related injuries do not loose their seniority and in fact their seniority continues to accumulate while absent.

Defendant asserts that the classification of employees as pregnant employees and non-pregnant employees for application of the aforementioned policies does not constitute unlawful sex discrimination under Title VII. Defendant acknowledges that a number of court decisions under Title VII, and the position of the Equal Employment Opportunity Commission, indicate that policies affording different treatment for temporary disability due to pregnancy than for all other non-work related disabilities is discrimination based on sex. However, it is asserted that the recent United States Supreme Court decision in Geduldig v. Aiello, ___ U.S. ___, 41 L.Ed.2d 256, ___ S.Ct. ___ (1974), determined that disparity of treatment between pregnancy related disability and other disabilities does not constitute sex discrimination. The primary source for defendant's argument is found in footnote 20 to the Court's opinion.

If defendant's reliance on the Geduldig decision were proper, then it would not be necessary to consider other cases in this area. For the reasons stated below, the court concludes that defendant's reliance on the Geduldig decision is not well founded.

In Geduldig the sole question presented was whether classifications under a disability insurance program established and administered under the laws of California violated the Equal Protection Clause of the Fourteenth Amendment. The asserted con-

stitutional violation was based on the exclusion of disabilities in connection with normal pregnancies from coverage under the insurance program. The United States Supreme Court held that the exclusion of normal pregnancies from benefit coverage did not involve improper state action. The standard applied by the Court to test the constitutional question was one of "reasonableness." There was no question concerning the legitimacy of the state's action in establishing the disability insurance program to supplement the workman's compensation program. The analytic key to the Geduldig decision is found in the following language:

> This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others . . ." * * * Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." * * *. (41 L.Ed.2d 256, 263-264. [emphasis added])

In finding a rational basis for the exclusion of normal pregnancies under the California disability insurance program, the Court noted several factors relating to the fiscal soundness of the program which were found sufficient.

It should be noted that Geduldig did not involve an assertion of unlawful action under the Civil Rights Act of 1964.

The plaintiff in Geduldig was not an employee nor prospective employee claiming unlawful discrimination by reason of the State's employment practices. The question of whether the California disability insurance program sufficiently affects interstate commerce so as to be subject to the Civil Rights Act of 1964 does not appear to have been litigated.

In discussing the rational basis of California's exclusion of pregnancy benefits, the Court referred to the cases of Reed v. Reed, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct, 251, and Frontiero v. Richardson, 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764. Both of these cases were brought under the Equal Protection Clause of the Fourteenth Amendment and in each case the Court found there was no rational basis for discrimination. In the Reed case the Court found a provision of the Idaho Probate Code giving preference to males in appointment of administrators to be violative of the Equal Protection Clause. Writing for the Court, the Chief Justice stated the test to be applied in Equal Protection type cases:

> . . . [T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. * * * The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (30 L.Ed.2d 225, 229).

In the final analysis the Court concluded that the Idaho statute had no rationale sufficient to sustain the different classifications established for men and women.

In the Frontiero decision the Court again found there was no rational basis for the distinction drawn in the payment of benefits between male and female members of the military services.

The standard applicable to state action under the Equal Protection Clause of the Fourteenth Amendment is distinct from the lawful power of Congress to establish different standards for conduct affecting interstate commerce. Under the Commerce Clause the Congress has plenary power to regulate all aspects of interstate commerce. Gibbons v. Ogden, 9 Wheat (22 U.S.) 1, 6 L.Ed. 23 (1824); United States v. Darby, 312 U.S. 100, 85 L.Ed. 609, 61 S.Ct. 473 (1941); Heart of Atlanta Motel v. United States, 379 U.S. 241, 13 L.Ed.2d 258, 85 S.Ct. 348 (1964); Maryland v. Wirtz, 392 U.S. 193, 20 L.Ed.2d 1020, 88 S.Ct. 2017 (1968). In effect Congress has established a standard for testing employment discrimination that goes beyond the standard of "reasonableness" traditionally applied to the States under the Equal Protection Clause of the Fourteenth Amendment.

To further illustrate the distinction between the two standards of permissible discrimination, it is helpful to consider the legislative history of Title VII. Title 42 U.S.C. Sec. 2000e, et seq. presents the standard to be applied in cases of employment discrimination. In 1972 Congress amended Title VII by deleting a portion of 42 U.S.C. Sec. 2000e(c) which originally provided:

> . . . but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance. . .

The effect of the 1972 amendment was to broaden the scope of Title VII and extend the employment standard to the States.

The case of Maryland v. Wirtz, supra, demonstrates the power of Congress under the Commerce Clause to prescribe the standard against which conduct will be gauged if that conduct affects interstate commerce. In noting that States are susceptible to the congressionally prescribed standards, the Court stated:

> But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulations. (20 L.Ed.2d. 1020, 1031)

The congressional standard to be applied under the Civil Rights Act of 1964 is stated in 42 U.S.C. Sec. 2000e-2 for those cases alleging discriminatory employment practices. The only exception to the standard that could have relevance in the instant case is found in 42 U.S.C. Sec. 2000e-2(e)(1) which provides that a classification based on sex, etc., is permissible if there is:

> . . . a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . .

In light of the Maryland v. Wirtz decision, supra, it would appear that the proper standard to be applied in all employment discrimination cases properly brought under Title VII is the congressionally mandated standard outlined above.

All sex discrimination cases do not fall within the same category. As this discussion has illustrated, there are at least two classifications of sex discrimination cases: those arising under the Equal Protection Clause of the Fourteenth Amendment and those arising under Title VII of the Civil Rights Act of 1964. These two categories involve the application of different standards for the determination of whether distinctions based on sex are permissible. Under the Equal Protection Clause there need be only a "reasonable basis" for the legislative determination. However, under the Civil Rights Act of 1964, there must be an actual business necessity for employment policies that discriminate on the basis of sex. See Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973); Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971); Williams v. American St. Gobain Corp., 447 F.2d 561 (10th Cir. 1971).

The Geduldig case was brought under the Equal Protection Clause and not under Title VII. Thus, the standard involved was one of legislative reasonableness. Since Geduldig was not an employment case, it would be improper to draw a negative inference as to the power of Congress to establish a different standard of permissible discrimination for employers admittedly

affecting interstate commerce.[1] For these reasons, defendant's contention that Geduldig controls in the instant case is rejected.

In the opinion of this court, defendant's employment practices are discriminatory in the following respects: (1) only pregnant women are required to take leave and thereby lose job bidding seniority and no leave is required in other non-work related disabilities; and (2) only pregnant women are denied sick leave benefits while in all other cases of non-work related disability sick leave benefits are available. Dessenberg v. American Metal Founding Co., 8 FEP Cases, 291 (D.C. Ohio); Hutchison v. Lake Oswego School District, 374 F.Supp. 1056 (1974); Gilbert v. General Electric Co., 375 F.Supp. 367 (1974). Defendant has

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[1] In Geduldig the minority opinion indicates a willingness to impose the congressional standard manifest in Title VII as the appropriate test under the Equal Protection Clause. The minority opinion further indicates a willingness to find State classifications based on sex to be unconstitutional per se. However, the majority opinion expressly relies on the "rational basis" formula as set forth in the traditional line of cases under the Equal Protection Clause. The dispute within the Court in Geduldig does not appear to be whether California's statute discriminates on the basis of sex, but rather the dispute focuses on whether that discrimination is permissible under the Fourteenth Amendment, i.e., it is a question of legislative reasonableness. The dissenting opinion ultimately rests on the conclusion that the State lacked a rational basis for the distinctions drawn. References to the provisions of Title VII and Equal Employment Commission decisions and regulations by the minority appear to furnish fuel for the proposition that the standard of reasonableness under the Equal Protection Clause should be strengthened to conform with the congressional statement of policy. Rejection of that argument by the majority does not rationally suggest that the standard established under Title VII is weakened or in anyway diminished in a case properly brought under the Civil Rights Act of 1964.

introduced no proof of any business necessity in support of these discriminatory policies. The court must therefore assume no justification exists.

III.

Plaintiff further alleges that defendant's action in not holding her job open for her while she was on pregnancy leave constitutes discrimination based on sex. This allegation must be considered in light of certain business factors.

Plaintiff's principal duties prior to being placed on maternity leave involved the posting of merchandise accounts. It appears that defendant was considering prior to plaintiff's pregnancy, and has now initiated, the transfer of certain accounting functions to its computer processing department. Further, defendant has undertaken to discontinue its merchandise business. Both of these factors suggest a legitimate basis for the decision not to hold plaintiff's job open in the accounting department. The court discerns no discriminatory conduct by defendant with reference to this issue.

IV.

It is further asserted that defendant's action in requiring plaintiff to begin her pregnancy leave on December 29, 1972, was arbitrary and in violation of Title VII.

Although defendant's "Employee Policy Manual" suggests that pregnancy leave commence during the fourth month, actual practice shows that no set time is arbitrarily established to determine when leave shall be taken. Defendant's Vide President-Personnel has stated that several factors are weighed when reaching the decision to start pregnancy leave. These factors include: the opinion of the employee's doctor; the employee's duties; work area; and degree of public contact. Although the Vice President-Personnel was to be the final judge of when these factors should dictate the commencement of leave, there is no showing of abuse in reaching that decision.

Following employee holidays on Friday, December 22, and Monday, December 25, 1972, plaintiff failed to report for work on the next four consecutive work days. The proof shows that she was having a problem with water retention at that time and that she also had a common cold. After being placed on maternity leave on December 29, 1972, plaintiff gave birth to her child on January 23, 1973, some twenty-five days after maternity leave had commenced.

It is of paramount significance that defendant's policies as actually practiced do not fix an arbitrary month or date on which pregnancy leave must begin. The facts in each situation are considered on an individual basis. Given plaintiff's problem with water retention and the subsequent birth of her child on the 25th day of maternity leave, defendant's action does not appear to be arbitrary or irrational. See Cleveland Board of Ed. v. LaFleur, 414 U.S. 632, 39 L.Ed.2d 52, 94 S.Ct. 791 (1974).

V.

A further issue in this cause is whether the termination of plaintiff's temporary employment on April 13, 1973, was in retaliation for her complaining about defendant's employment policies with respect to pregnancy.

Plaintiff returned to work with defendant as a temporary employee on March 14, 1973. It was defendant's policy to place women returning from maternity leave in available temporary positions until a permanent opening was awarded on the basis of job bidding. Plaintiff worked as a temporary employee until April 13, 1973, when the temporary project to which she was assigned was completed. Plaintiff continued to apply for permanent job positions but was frustrated in her efforts by those policies causing her to loose credit for accumulated seniority in job bidding. The court finds no evidence of retaliatory

termination of plaintiff for assertion of her civil rights. However, it is clear that plaintiff's termination request was the result of her inability to retain permanent employment following forfeiture of her job bidding seniority rights by defendant.

VI.

The court concludes that plaintiff is entitled to the following relief:

1. Recovery of sick leave benefits that should have been paid during her maternity leave. Plaintiff is also entitled to have sick leave benefits credited and accumulated from the time she returned from maternity leave on March 14, 1973.-

2. Back wages from March 14, 1973, until the present. The back wages shall be computed on the rate of pay earned by plaintiff on December 29, 1972, plus any across the board increases which may have occurred since that time. However, back pay will be reduced by amounts paid for temporary work with defendant, unemployment compensation received from the State of Tennessee, and wages from other employment.

3. Reinstatement as a permanent employee as of the date that the first permanent position after March 14, 1973, was filled with another employee having less seniority than plaintiff. Plaintiff will be credited with full seniority from the date of her initial hiring by defendant.

4. Recovery of reasonable attorney's fees.

The court authorizes the defendant to submit affidavits concerning plaintiff's status upon reinstatement. If there has been a reduction in force by defendant which would have caused plaintiff's termination sometime after March 14, 1973, based on seniority computed from the date of her initial hiring, that fact may be shown to properly adjust the relief awarded plaintiff. Such affidavits should also reflect applicable "bumping" procedures, if any, to clarify whether or not plaintiff would have been entitled to a lesser position in defendant's company. Defendant may submit other data relating to the entitlement of plaintiff under the terms of this memorandum. However, defendant shall furnish copies of such affidavits to plaintiff's counsel and plaintiff shall have an opportunity to respond. The court will review such affidavits as are submitted relative to the determination of plaintiff's reinstatement and back wages, and if any material issue of fact is presented, a further hearing will be ordered on that matter. Defendant is allowed fifteen (15) days for the submission of affidavits and plaintiff shall have ten (10) days following defendant's submission to file counter-affidavits.

Counsel for plaintiff will submit an order consistent with the provisions of this memorandum.

L. Clure Morton

UNITED STATES DISTRICT JUDGE

CSI: A TRUE COPY

Brandon Lewis, Clerk
U. S. District Court
Middle District of Tennessee
By: _____ D.C.

C 375—Affidavit of Personal Service of Papers on Individual.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket
~~Index~~ No. 74-2352

WOMEN IN CITY GOVERNMENT UNITED, et al.,

Plaintiffs-
Appellants

against

THE CITY OF NEW YORK, et al.,

Defendants-
Appellees

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

MICHAEL S. MARTIN *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

3 South Cottage St., Valley Stream, N.Y. 11580

That on the 31st *day of* December *19*74 *at* 98 Cutter Mill Road, Great Neck, N.Y. 11021

deponent served the annexed Appellants' Brief *upon* Mirkin, Barre, Saltzstein & Gordon, P.C., attorneys for Defendants-Appellees Social Serv. Emp. Union Local 371 and Social Serv.Emp. Union Local 371 Welfare Fund

~~the~~ two ies *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* said attorneys *herein,*

Sworn to before me, this 31st *day of* December *19*74.

GEORGE COHEN
Notary Public, State of New York
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1975

Michael S. Martin

Print name beneath signature

MICHAEL S. MARTIN

C 375— Affidavit of Personal Service of Papers on Individual.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
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WOMEN IN CITY GOVERNMENT UNITED, et al.,

Plaintiffs-
Appellants

against

THE CITY OF NEW YORK, et al.,

Defendants-
Appellees

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

MARCEL DIAZ *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
1404 Putnam Avenue, Brooklyn, N.Y. 11227

That on the 30th *day of* December *19*74 *at* 1 Chase Manhattan Plaza, New York, New York 10005

deponent served the annexed Appellants' Brief *upon*
Breed, Abbott & Morgan, Esqs., attorneys for Defendants-Appellees Associated Hospital Service, Inc. and United Medical Service, Inc.

the ~~xx~~ *in this action by delivering a true copy* two *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* said attorneys *herein,*

Sworn to before me, this 30th
day of December *19*74. GEORGE COHEN

Notary Public, State of New York
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1975

Marcel Diaz
Print name beneath signature
MARCEL DIAZ

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JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

MARCEL DIAZ *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
1404 Putnam Avenue, Brooklyn, N.Y. 11227

That on the 30th *day of* December *19* 74 *at* 375 Park Avenue, New York, New York 10022

deponent served the annexed Appellants' Brief *upon*
Trubin, Sillcocks, Edelman & Knapp, Esqs., Attorneys for Defendant-Appellee, Group Health Incorporated

~~xxx~~ *in this action by delivering a true copy/thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* said attorneys *herein,*

two ies

Sworn to before me, this 30th *day of* December *19* 74

GEORGE COHEN
Notary Public, State of New York
No. 31-0082100
Qualified in New York County
Commission Expires March 30, 1975

Marcel Diaz
Print name beneath signature
MARCEL DIAZ

C 375—Affidavit of Personal Service of Papers on Individual.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
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UNITED STATES COURT OF APPEALS
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Docket
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WOMEN IN CITY GOVERNMENT UNITED, et al.,

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against

THE CITY OF NEW YORK, et al.,

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Appellees

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

MARCEL DIAZ *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1404 Putnam Ave., Brooklyn, N.Y. 11227

That on the 31st *day of* December *19* 74 *at* 409 West 21st Street, New York, N. Y.

deponent served the annexed Appellants' Brief *upon* Bertram Perkel, Esq., Attorney for Defendants-Appellees District Council 37 and District Council 37 Health & Security Plan

~~the~~ two ies *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* said attorney *herein,*

Sworn to before me, this 31st *day of* December *19* 74.

GEORGE COHEN
Notary Public, State of New York
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1975

Marcel Diaz

Print name beneath signature

MARCEL DIAZ

C 375—Affidavit of Personal Service of Papers on Individual.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket
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WOMEN IN CITY GOVERNMENT UNITED, et al.,

Plaintiffs-Appellants

against

THE CITY OF NEW YORK, et al.,

Defendants-Appellees

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

MARCEL DIAZ being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1404 Putnam Avenue, Brooklyn, N.Y. 11227

That on the 30th day of December 1974 at 140 Park Place, New York, New York 10007

deponent served the annexed Appellants' Brief upon

Julius Topol, Esq., Attorney for Defendant-Appellee District Council 37

~~the~~ two ies in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the said attorney herein,

Sworn to before me, this 30th day of December 1974

George Cohen

GEORGE COHEN
Notary Public, State of New York
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1975

Marcel Diaz

Print name beneath signature

MARCEL DIAZ

C 375— Affidavit of Personal Service of Papers on Individual.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-2352

WOMEN IN CITY GOVERNMENT UNITED, et al.,

Plaintiffs-Appellants

against

THE CITY OF NEW YORK, et al.,

Defendants-Appellees

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

MARCEL DIAZ being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1404 Putnam Avenue, Brooklyn, N.Y. 11227

That on the 30th day of December 1974 at 230 Park Avenue, New York, New York

deponent served the annexed Appellants' Brief upon Delson and Gordon, attorneys for Defendants-Appellees United Federation of Teachers and United Federation of Teachers Welfare Fund

the two ies in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the said attorneys herein,

Sworn to before me, this 30th day of December 1974.

GEORGE COHEN
Notary Public, State of New York
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1975

Marcel Diaz

Print name beneath signature

MARCEL DIAZ

C 375—Affidavit of Personal Service of Papers on Individual.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-2352

WOMEN IN CITY GOVERNMENT UNITED, et al.,

Plaintiffs-Appellants

against

THE CITY OF NEW YORK, et al.,

Defendants-Appellees

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

M. Brodkin, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1414 East 12 St., Brooklyn, N.Y. 11230

That on the 30th day of December 1974 at New York City Housing Authority (6th fl. Legal Dept. Recp. Desk), 250 Broadway, New York, N.Y.

deponent served the annexed Appellants' Brief upon

Edward L. Norton, Esq., attorney for Defendant-Appellee New York City Housing Authority

~~the~~ two ies in this action by delivering ~~a~~ true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the said attorney herein,

Sworn to before me, this 30th day of December 1974.

GEORGE COHEN
Notary Public, State of New York
No. 31-0632100
Qualified in New York County
Commission Expires March 30, 1975

M. Brodkin

Print name beneath signature

M. Brodkin

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

WOMEN IN CITY GOVERNMENT UNITED, et al., : Docket No. 74-2352

Plaintiffs-Appellants, :

-against- : AFFIDAVIT OF PERSONAL SERVICE

THE CITY OF NEW YORK, et al., :

Defendants-Appellees. :

- X

STATE OF NEW YORK, COUNTY OF NEW YORK: SS.:

MARCEL DIAZ , being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1404 Putnam Avenue, Brooklyn, N. Y. 11227 . That on the 30th day of December, 1974 at the Municipal Building, New York, N. Y. 10007 deponent served the annexed Appellant's Brief upon The Corporation Counsel of the City of New York, attorney for defendants-appellees The City of New York, Abraham Beame, Harry Bronstein, New York City Health and Hospitals Corporation, New York City Off-Track Betting Corporation, Joseph Monserrat, Seymour P. Lachman, Isaiah E. Robinson, Jr., and Mary E. Meade in this action by delivering two true copies thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the said attorney herein.

Marcel Diaz
MARCEL DIAZ

Sworn to before me, this
30th day of December, 1974.

George Cohen

GEORGE COHEN
Notary Public, State of New York
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1975